IN THE SUPREME COURT
OF THE UNITED STATES

No. 78-612

THE STATE OF OHIO ON RELATION
OF JACK M. SCHULMAN, DIRECTOR OF LAW OF
THE CITY OF CLEVELAND, OHIO, Petitioner,

v.

JOSEPH G. TEGREENE,
DIRECTOR OF FINANCE OF
THE CITY OF CLEVELAND, OHIO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

CHARLES S. TRICARICHI
TRICARICHI, CARNES
& KUBE
55 Public Square
Cleveland, Ohio 44113
(216) 861-6677

Attorney for Respondent

NEIL K. EVANS
HAHN, LOESER, FREEDHEIM,
DEAN & WELLMAN
800 Nat. City-E.6th Bldg.
Cleveland, Ohio 44114
(216) 621-0150

Attorney for Petitioner

William R. Chadeayne
Richard R. Kane
Marshall L. Lerner
Bricker, Evatt, Barton
& Eckler
100 East Broad Street
Columbus, Ohio 43215

Attorneys for James E. Betts
and Robert E. Haley

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

IN THE SUPREME COURT
OF THE UNITED STATES

No.

THE STATE OF OHIO ON RELATION OF
JACK M. SCHULMAN
DIRECTOR OF LAW OF THE CITY OF
CLEVELAND, OHIO, Petitioner,

v.

JOSEPH G. TEGREENE
DIRECTOR OF FINANCE OF THE CITY OF
CLEVELAND, OHIO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

Jack M. Schulman, Director of Law, on behalf of the City of Cleveland, petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio, dated July 5, 1978, in an original action in mandamus, wherein the Supreme Court of Ohio refused to follow prior decisions by the U.S. Court of Appeals for the Sixth Circuit and the U.S. District Court for the District of Columbia which determined that certain judgments against the City were noncontractual. The Ohio Supreme Court instead held that those judgments were based on contract, and refused the City its requested relief in mandamus which would have authorized the City to issue judgment bonds to satisfy the judgments.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (A.1)[1] denying issuance of a writ in this action in mandamus is reported at 55 Ohio St. 2d 22 (1978). The order denying rehearing (A.10) is not yet reported.

The opinion of the Sixth Circuit Court of Appeals (A.11) with which the Ohio Supreme Court decision conflicts is reported at 570 F.2d 123 (1978).

The opinion of the United States District Court for the District of Columbia (A.26) with which the Ohio Supreme Court decision conflicts was rendered on June 14, 1978 and is not yet reported. An appeal by the City of Cleveland of the D.C. Court

---

1 We refer to the appendix included with this petition as "A".

proceedings is pending as Case No. 78-1911 in the Court of Appeals for the District of Columbia.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 5, 1978 (A.9). A timely petition for rehearing was denied on September 7, 1978 (A.10). This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257(3).

QUESTION PRESENTED

Has the Supreme Court of Ohio improperly refused to give effect to judgments of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the District of Columbia and thereby denied the City of Cleveland a title or right claimed under an authority exercised under the United States?

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 18.

The Congress shall have Power . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. III, § 2, cl. 1.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Counsuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to

Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- Between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST., art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT

This petition for certiorari arises out of an extended history of litigation between the City of Cleveland, an Ohio "home-rule" municipal corporation, and the Cleveland Electric Illuminating Company ("CEI"), a private investor-owned public utility in northern Ohio. One branch of that litigation in the federal courts resulted in a determination by the United States Court of Appeals for the Sixth Circuit in a decision of February 16, 1978 that certain judgments obtained by CEI against the City of Cleveland in the United States District Court for the Northern District of Ohio were based upon direct orders of the Federal Power Commission (hereinafter "FERC"),[2] were non-

---

2 The Federal Power Commission was replaced by the Federal Energy Regulatory Commission on October 1, 1977. Both Commissions are collectively referred to herein as the "FERC".

contractual in nature, and therefore presented a federal question and a proper basis for Federal Court jurisdiction. When the City, subsequently relying upon that determination that the judgments were noncontractual, went before the Ohio Supreme Court in an action in mandamus seeking authorization to issue judgment bonds to pay the judgments, that court, contrary to the decision of the Sixth Circuit and the D.C. District Court, held that the judgments were contractual in nature and refused the relief requested.

A. Orders of the Federal Power Commission.

The orders of the FERC arose out of the following background. For many years the City, through its wholly-owned and operated Municipal Electric Light Plant

("MELP"), and CEI have been competitors in the retail sale and distribution of electric energy in the City of Cleveland. From the early 1960's until 1971, MELP sought voluntary interconnections with CEI to improve its reliability, to protect its system against emergency overloads and outages, and to utilize power through interconnections while maintaining and repairing its equipment. After repeated refusals by CEI to cooperate, the City filed a complaint on May 13, 1971 before the FERC requesting that CEI be required to establish a permanent electrical interconnection with the City's MELP. After protracted litigation, the FERC finally ordered a permanent interconnection on specified terms and conditions. The City

sought a rehearing of the terms and conditions imposed and the rates set by the Commission. On March 9, 1973, the Commission ordered that unless the City agreed to all the terms and conditions of the FERC, the interconnection would be terminated. The City therefore acceded to the terms and conditions of the FERC order while reserving its right of appeal. The matter was twice appealed to the Court of Appeals for the District of Columbia and twice returned to the FERC for rehearing. A controversy involving computation of late payment charges against MELP is still pending before the FERC. On December 12, 1975, FERC filed with the U.S. District Court of the District of Columbia an action seeking enforcement of its order of

CEI all past due sums not in controversy for power furnished to the City by CEI and to place in escrow all past due sums which were in controversy. In addition, the FERC moved for an accounting of past due amounts owed to CEI by the City. On June 14, 1978, the District Court granted a motion of the FERC for partial summary judgment and ordered an accounting. An appeal by the City of the decision is pending before the Court of Appeals for the District of Columbia as Case No. 78-1911.

B. District Court Proceedings Concerning the Judgments.

On July 1, 1975, the City instituted an antitrust proceeding against CEI and four other major electric power companies

in Case No. C75-560 in the United States District Court for the Northern District of Ohio, Eastern Division.[3] Five months after the complaint was filed, CEI filed counterclaims for amounts allegedly owing by the City to CEI for electric power supplied in 1975 and 1976.

In September of 1976 and April of 1977, the District Court rendered two judgments (the "Judgments") in favor of CEI against the City in the aggregate amount of $13,450,528.48 with interest at the rate of 1% per month on most of the

---

3 This proceeding is predicated on such decisions of this Court as Otter Tail Power Company v. United States, 410 U.S. 366 (1973). In City of Cleveland v. Cleveland Electric Illuminating Company et al., ___, U.S. ___, 46 U.S.L.W. 3665 (April 24, 1978), this Court declined to issue a petition of writ of certiorari to review the decision of the Court of Appeals of the Sixth Circuit which found that CEI's counsel, which

Judgment amount. The City perfected its appeal on the Judgments to the United States Court of Appeals for the Sixth Circuit.

C. Proceedings in the United States Court of Appeals for the Sixth Circuit.

In the Court of Appeals for the Sixth Circuit the City challenged the jurisdiction of the District Court to award the Judgments, arguing inter alia that the District Court lacked jurisdiction over these counterclaims because there was no basis for ancillary jurisdiction, there was no diversity of citizenship, and there was no federal question presented because the counterclaims were purely contractual. The response of the Circuit Court of Appeals as reported in City of Cleveland v. Cleveland Electric Illuminating

---

had previously represented the City as bond counsel, were not thereby subject to disqualification.

Company, 570 F.2d 123 (1978) was as follows:

> Even if CEI's counterclaims were merely permissive and thus not within the ancillary jurisdiction of the District Court the counterclaims still presented a federal question within the Court's jurisdiction.
>
> The Federal Power Act, 16 U.S.C. § 825(p), provides:
>
> > The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter of the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created [thereby], or to enjoin any violations [thereof]. . . . Any suit or action to enforce any [such] liability or duty . . . may be brought in . . . the district wherein the defendant is an inhabitant. [citations omitted] . . .
>
> The City contends that the counterclaim is based on contract and not on an order of the FPC. This contention appears to us to be without merit. FPC ordered the City to enter into the contract in order to be entitled to the 138 KV interconnection which the City sought. CEI filed motions with FPC on July 13, 1973 and on January 30, 1974, alleging the continued failure of the

City to pay for power provided through the existing 69 KV interconnection, and seeking enforcement of the payment provisions of the previous FPC orders. As before stated, on April 8, 1974 FPC issued an order directing compliance with its previous orders and ordering the City to make payment to CEI of all undisputed charges for past and future services, including any accrued interest, and to deposit in escrow any disputed amounts. (App. 0150). Clearly this is a definite order to pay.

. . .

The fact that FPC filed suit against the City in the Federal District court for the District of Columbia to enforce its order of April 8, 1974, does not preclude CEI from filing its counterclaim to enforce said order so long as the charges have remained unpaid and the order of FPC remains unenforced.

Under the statute the District Court had jurisdiction to entertain these counterclaims as enforcing the FPC orders of January 11 and March 9, 1973 (Nos. 644 and 644-A), and April 8, 1974, and the contract entered into pursuant thereto.

For the reasons stated, the judgments of the District Court are affirmed.

The City's motion for stay is denied without prejudice to renewal before the District Court upon showing good faith efforts to issue bonds, the proceeds of the sale of which are to be used to satisfy the judgments. (emphasis added.) (A.23 - A.25, 570 F.2d at 128-29).

Promptly following the decision of the Sixth Circuit on February 22, 1978, CEI caused the United States Marshal to levy on all goods and chattels owned by the City of Cleveland and used in the Department of Public Utilities, including MELP and the Division of Water and Heat. The City immediately sought a stay of execution of the judgment before the District court to afford the City time to attempt to issue judgment bonds to pay the Judgments. The City promptly enacted legislation authorizing the issuance of notes in anticipation of bonds for the purpose of paying the Judgments.

D. Proceedings in the United States District Court for the District of Columbia.

The FERC instituted an action on December 12, 1975, subsequently with CEI

intervening in the proceedings, in the District Court for the District of Columbia, seeking an injunction to compel the City to comply with the aforementioned orders of FERC. The District Court, granting the motions of the FERC and CEI for partial summary judgment, held that:

> A review of the facts, the admission in pleadings and sworn testimony, and the orders of the United States District Court for the Northern District of Ohio establish that Cleveland has received energy pursuant to an interconnection order by the Commission in Opinion Nos. 644 and 644-A, but has refused to obey those same orders and the order of April 8, 1974 by failing to pay in full undisputed amounts for the service rendered by CEI and by failing to place all disputed amounts including interest and excise tax in an escrow account. (emphasis added.) (A.32 - A.33).

An appeal by the City of Cleveland of the decision of the District court for the District of Columbia is pending as Case No. 78-1911 in the Court of Appeals for the District of Columbia.

E. Decision of the Ohio Supreme Court.

On February 24, 1978, to form the basis of a test case to obtain court approval for the issuance of the bonds, the Director of Finance of the City of Cleveland refused to perform his statutory duties required for the issuance of the bonds, contending that if such judgment bonds were issued, they would violate the prohibitions set forth in Ohio Revised Code ("ORC") § 133.24 in effect prohibiting the use of bonds for contractual obligations.

The City then instituted an original action in mandamus in the Supreme Court of Ohio, seeking to compel respondent, Director of Finance, to perform his duties. The City contended that the Judgments which would be satisfied with the proceeds of the sale of such bonds and notes were based on noncontractual obligations of the City and were therefore within the "noncon-

tractual" exemption provided in ORC § 133.27.

The petitioner's complaint for mandamus made reference to the opinion of the Court of Appeals for the Sixth Circuit which held that the Judgments were based upon the orders of the FERC and were noncontractual. The brief of plaintiff-relator (petitioner herein), which was filed with the Supreme Court of Ohio in the original action in mandamus, delineated in detail the argument that the Judgments rendered against the City and in favor of CEI had been found by the Sixth Circuit and the District Court for the District of Columbia to be based upon the enforcement of orders of the FERC and not upon contract.

The Supreme Court of Ohio ignored the holdings of the Sixth Circuit in its decision denying the writ of mandamus and stated without elaboration:

> However, in the cause at bar, no ex lege relationship exists between the City and CEI. Their relationship is purely contractual. This contract may have been thrust upon the City through the force of circumstances and several of the terms of the contract were virtually dictated by the Federal Power Commission, but it is in fact a contractual obligation. (A.8; 55 Ohio St. 2d at 26).

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Sixth Circuit expressly rejected the argument that the obligations arising from the Judgments were based on contract, and held that the obligations arising from the Judgments were based on the FERC orders and were non-contractual. The Supreme Court of Ohio refused to give effect to the judgments of the Sixth Circuit and the District Court for the District of Columbia, and thereby denied petitioner a title or claim claimed under authority exercised under the United States.

It is an established principle of law that the Supreme Court of the United States has jurisdiction to review judgments of state courts which refuse to give effect to a judgment of a federal court, since it involves a denial of a title or right claimed under an authority exercised

under the United States. Dupasseur v. Rochereau, 88 U.S. 130 (1875); Embry v. Palmer, 107 U.S. 3 (1883); Crescent City Live Stock Landing, Etc. Co. v. Butchers' Union, Etc. Co., 120 U.S. 141 (1887); Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co., 172 U.S. 493 (1899); Hancock National Bank v. Farnum, 176 U.S. 640 (1900); West Side Belt R. Co. v. Pittsburgh Construction Co., 219 U.S. 92 (1911); Arkansas ex rel. Utley v. St. Louis-S. E. R. Co., 269 U.S. 172 (1925); Motlow v. Missouri ex rel. Koeln, 295 U.S. 97 (1935).

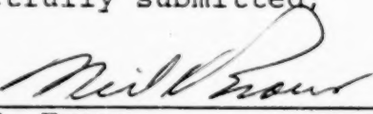
In view of the fact that CEI is pressing forward to levy execution on the Judgments on property which is necessary to the continued operation of essential services provided by the City, it is imperative that the Court review the decision of the Supreme Court of Ohio so that the City may be in a position to

issue judgment bonds and avoid levy and execution on essential City property.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



Neil K. Evans
800 National City-E. 6th Bldg.
Cleveland, Ohio 44114
(216) 621-0150

Attorney for Petitioner

CERTIFICATE OF SERVICE

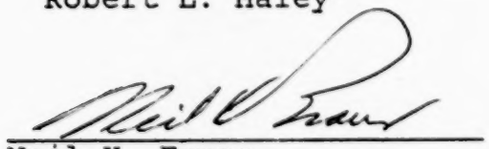
This is to certify that, pursuant to United States Supreme Court Rules 21(3) and 33, three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Ohio were mailed, United States Mail, Postage Prepaid, this 10th day of October, 1978 to the following counsel of record.

Charles S. Tricarichi
Tricarichi, Carnes & Kube
55 Public Square
Cleveland, Ohio 44113

Attorneys for Respondent
Joseph G. Tegreene

William R. Chadeayne
Richard R. Kane
Marshall C. Lerner
Bricker, Evatt, Barton & Eckler
100 East Broad Street
Columbus, Ohio 43215

Attorneys for Respondents
James E. Betts and
Robert L. Haley



Neil K. Evans
800 National City-E. 6th Bldg.
Cleveland, Ohio 44114
(216) 621-0150

Attorney for Petitioner

APPENDIX

THE SUPREME COURT OF OHIO

THE STATE, EX REL. SCHULMAN, DIR. OF LAW, CITY OF CLEVELAND V. TEGREENE, DIR. OF FINANCE, CITY OF CLEVELAND

[Cite as State, ex rel. Schulman, v. Tegreene (1978), 55 Ohio St.2d 22.]

Municipal corporations--Issuance of bonds--Mandamus--To order implementation of sale of bonds--Bonds Illegal, when--R. C. 133.27--Writ denied.

(No. 78-264--Decided July 5, 1978.)

IN MANDAMUS.

The parties agree upon the following facts: The City of Cleveland ("City") is a validly existing municipal corporation established by charter. Relator, Jack M. Shulman ("Shulman") [sic], is the Director of Law of the City and is empowered, pursuant to Section 89 of the Charter of the City, to maintain this action on behalf of the City. Joseph G. Tegreene, respondent ("Tegreene"), is the Director of Finance of the City.

R. C. 133.21 requires that the fiscal officer of the City certify to the Council of the City the maximum maturity of the bonds before an ordinance providing for the issuance of bonds, notes or other evidence of indebtedness is adopted. R. C. 133.27 provides that the fiscal officer certify that within the limit of funds

available for the purpose, if the City is unable to pay a final judgment in an action for personal injuries or based on any other noncontractual obligation, bonding funding may be approved. Tegreene delivered to the Council of the City the certifications required by R. C. 133.21 and 133.27. The Council of the City then enacted Ordinance No. 76-A-78 (the "Bond Ordinance"), which authorizes the issuance of bonds, and provides for the issuance of notes in anticipation thereof, in an amount not to exceed $20 million for the purpose of providing funds for paying final judgments rendered against the City in the District Court proceeding and which were affirmed by the United States Court of Appeals. The bond ordinance was then approved and is in force.

Pursuant to the provisions of Section 4 of the ordinance, Schulman certified to Tegreene that the judgments referred to in the bond ordinance are final judgments. One of the bases for this certification was the opinion rendered February 16, 1978, by the United States Court of Appeals for the Sixth Circuit.

On February 24, 1978, a certified copy of the bond ordinance with Schulman's certificate and written direction of the steps to be taken by Tegreene were delivered to Tegreene. Upon receipt of the copy of the bond ordinance, Tegreene advised Schulman and the City that he had and would continue to refuse, to certify and deliver a certified copy of the bond ordinance to the Auditor of Cuyahoga County, which refusal the City claims is contrary to law.

Tegreene admits that this refusal prevents the City from complying with the provisions of R. C. 133.32 and from issuing notes and bonds and that this refusal bars the City from using the proceeds from the issuance of the bonds, and notes in anticipation thereof, to satisfy the judgments referred to in the bond ordinance.

The City, attempting to implement the sale of such bonds and notes in anticipation thereof, is before this court requesting it to order the Director of Finance to take actions necessary to implement such sale.

Messrs. Hahn, Loeser, Freedheim, Dean & Wellman and Mr. Neil K. Evans, for relator.

Messrs. Tricarichi, Carnes & Kube and Mr. Charles S. Tricarichi, for respondent.

Per Curiam. The present bond issuing capacity of a municipal corporation in this state is founded primarily upon the principle that a municipal corporation should have the capacity to amortize the cost of capital improvements over the life of such improvements, but such municipal corporation should pay current operating expenses from current revenues. R. C. 133.24 provides, in pertinent part, that:

"The taxing authority of any subdivision may issue the bonds of such subdivision for the purpose of acquiring or constructing any permanent improvement which such subdivision is authorized to acquire or construct. * * * No subdivision or other political taxing unit shall

create or incur any indebtedness for current operating expenses, except as provided in sections 133.27 to 133.31, inclusive, of the Revised Code."

One of the exceptions referred to in R. C. 133.24, as relevant to the instant cause, is R. C. 133.27, which provides as follows:

"When the fiscal officer of any subdivision certifies to the bond issuing authority that, within the limits of its funds available for the purpose, the subdivision is unable to pay a final judgment or judgments rendered against the subdivision in an action for personal injuries or based on any other noncontractual obligation, then such subdivision may issue bonds for the purpose of providing funds with which to pay such final judgment in an amount not exceeding the amount of the judgment or judgments together with the costs of the suit in which such judgment or judgments are rendered and interest thereon to the approximate date when the proceeds of such bonds are available."

This exception expressly permits bonds to be issued to fund judgments rendered for personal injuries or any other noncontractual obligation for which funds are not available.

The City argues that it was put into such a position[1] that it was compelled to

---

1 In May 1971, the City filed a complaint with the Federal Power Commission (FPC). In its complaint, the City requested an order under Section 202(6) of the Federal Power Act, Section 8242(b), Title 16, U.S. Code, requiring Cleveland Electric Illuminating Co. (CEI) to establish a permanent electrical interconnection with the City's light plant.

In March 1972, the FPC found that an emergency existed by reason of a shortage of reliable facilities whenever the City's largest generating unit was out of service. The FPC did, however, determine that the City should not be able to use the interconnection unless and until all available generating capacity of the City was in operation. The Presiding Examiner ordered the permanent interconnection on specified terms and conditions.

The City appealed the terms and conditions imposed and the rates set

enter into the contract with CEI and, therefore, this contractual obligation should not be considered as the voluntary act of the City.

In 1921, the Ohio General Assembly, by enacting the Griswold Act (109 Ohio Laws 336), changed the earlier law that permitted municipal corporations to fund current operating expenses through the issuance of bonds. This Act was adopted "[t]o prohibit the creation or incurring of indebtedness of political subdivisions of the state for current expense . . . ." The Griswold Act changed prior law and set

forth the principle, subject to exceptions, that political subdivisions should not be permitted to incur long-term indebtedness for obligations properly payable from current operating revenues.

In May 1927, the Ohio General Assembly approved The Uniform Bond Act, 112 Ohio Laws 364, which continued in effect the prohibitions of the Griswold Act with substantially the same exceptions.

---

by the FPC. On January 11, 1973, the FPC in Opinion No. 644 modified the Presiding Examiner's initial decision in certain respects.

By letter dated March 16, 1973, to the FPC, the City agreed to all of the terms and conditions of Opinion 644 while reserving the right to appeal such decision to the United States Court of Appeals, District of Columbia Circuit.

To implement compliance with the FPC orders, on January 20, 1975, Council of the City passed ordinances authorizing the Director of Public Utilities to enter into agreements with CEI for the installation and equipment costs of the interconnection and to enter into an agreement with CEI for an interim or permanent interconnection. On April 17, 1975, these agreements authorized by the City Council were signed by the parties and on April 28, 1975, forwarded to the FPC for filing pursuant to Opinion No. 644.

The primary pronouncement by this court on the issue of bonds for non-contractual obligations is found in State, ex rel. Gordon v. Barthalow, (1948), 150 Ohio St. 499. The city of Columbus failed to pay the salaries of some city employees based upon an inability to pay. The employees sued the city and their claims were reduced to judgment. The city council passed an ordinance providing for the issuance of bonds to pay these judgments. The ordinance was approved by the mayor and the city auditor was directed to certify a copy of the ordinance to the county auditor. The city auditor did not do so on the basis that the judgments were based upon non-contractual obligations under the then effective bond law, G. C. 2293-3. A complaint for a writ of mandamus was filed in this court seeking to require the city auditor to certify a copy of the ordinance to the county auditor.

This court recognized that under G. C. 2293-2, there was no doubt that salaries of municipal officers and employees were current operating expenses and that, if G.C. 2293-2 stood alone, bonds could not legally be issued to pay for such salaries. However, this court, also, held that these judgments fell within the exception to G. C. 2293-2, set forth in G. C. 2293-3, that the judgments were based upon "noncontractual obligations." In so doing, this court held that the employees' salaries were based upon an ex lege relationship with the city and were not based upon contracts. Judgment bonds could, therefore, properly be issued and the writ was allowed.

However, in the cause at bar, no ex lege relationship exists between the City and CEI. Their relationship is purely contractual. This contract may have been thrust upon the City through the force of circumstances and several of the terms of the contract were virtually dictated by the Federal Power Commission, but it is in fact a contractual obligation.

The bonds, concerning which the City would have this court order the Director of Finance to take actions necessary for their implementation would be based upon contractual obligations and, therefore, are illegal under R. C. 133.27.

Accordingly, the writ of mandamus is denied.

Writ denied.

O'Neill, C.J., Herbert, Celebrezze, W. Brown, P. Brown, Sweeney and Stevenson, J.J., concur.

Stephenson, J., of the Fourth Appellate District sitting for Locher, J.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	)	
	)	1978 TERM
CITY OF COLUMBUS.	)	
	To wit:	July 5, 1978
The State of Ohio, ex rel.		
Jack M. Schulman,	)	
Director of Law,	)	
Relator,	)	No. 78-264
	)	
vs.	)	IN MANDAMUS
Joseph G. Tegreene,	)	
Director of Finance	)	
Respondent.	)	

This cause originated in this court on the filing of a complaint for a writ of mandamus and was considered in the manner prescribed by law. On consideration thereof, it is ordered by the court that the writ be, and the same hereby is, denied, for the reasons set forth in the opinion rendered herein.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ___ Page ___.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 5th day of July, 1978.

THOMAS L. STARTZMAN, Clerk

By_____, Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)
) 1978 TERM
CITY OF COLUMBUS)

To wit: September 7, 1978

STATE OF OHIO, ex. rel. Jack M. Schulman, Dir. Relator,)
)
vs.) No. 78-264
)
JOSEPH G. TEGREENE, DIR., Respondent.) REHEARING

It is ordered by the court that rehearing in this case is denied.

I. THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ___ Page ___

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 7th day of September 1978.

Thomas L. Startzman, Clerk

By_____, Deputy

CITY OF CLEVELAND,
Plaintiff-Appellant,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Defendant-Appellee.

Nos. 77-3017 and 77-3310.

United States Court of Appeals,
Sixth Circuit.

Argued Dec. 8, 1977.
Decided and Filed Feb. 16, 1978.

Before PHILLIPS, Chief Judge, and WEICK and PECK, Circuit Judges.

WEICK, Circuit Judge.

The City of Cleveland (City) has appealed from a summary judgment entered against it by the District Court on Counts 2 and 3 of the Second Counterclaim filed against the City by The Cleveland Electric Illuminating Company (CEI), which judgment was made final under Fed.R.Civ.P. 54(b).

I

The City had filed an antitrust action in the Federal District Court against defendants, CEI, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company and Toledo Edison Company.[1]

1. The defendants other than CEI are not parties to this appeal.

In its complaint the City alleged acts of conspiracy to monopolize and to restrain trade in the electric power generating market, in violation of the Sherman Act, 15 U.S.C. §§ 1 & 2, and prayed for damages and injunctive relief.

CEI filed an answer and two counterclaims, only the second of which is at issue here. Count 2 of the Second Counterclaim alleged that the City had failed to pay CEI the purchase price of electric power supplied by CEI to the City's municipal electric light plant, and the cost of construction and installation for the City of a permanent 138 KV interconnection over which the current was supplied, pursuant to certain Federal Power Commission (FPC) orders and a contract entered into between the parties.

Two additional counterclaims, styled Counts 3 and 4 of the Second Counterclaim, were subsequently filed, each alleging nonpayment of charges for electric power supplied to the City during later periods. The City filed answers to Counts 2 and 4, but filed no answer to Count 3.

On motion of defendant CEI, summary judgment was entered in favor of CEI against the City on Counts 2 and 3 in a memorandum and order of the District Court dated August 4, 1976, and judgment was entered on September 21. The Court granted summary judgment on Court 4 on February 24, 1977 and judgment was entered on April 7, following a joint stipulation of the parties with respect to the amount owed.

From these judgments plaintiff City now appeals. The appeal in case No. 77-

3017 is from the judgments on Counts 2 and 3 of CEI's Second Counterclaim; the appeal in case No. 77-3310 is from the judgment entered on Count 4. Because the issues concerned in the two appeals are identical they will be considered together.

II

The sole issue in the City's appeals is the claim that CEI's counterclaims were not compulsory counterclaims within the meaning of Fed.R.Civ.P. 13(a), and that therefore the District Court lacked subject-matter jurisdiction over them. The City did not question that it owed CEI the amounts for which judgments were entered.

We disagree with the City's contentions, and accordingly we affirm the judgments of the District Court. We hold first, that CEI's counterclaims were compulsory counterclaims and were within the ancillary jurisdiction of the District Court; and second, in any event and independently, we hold that the District Court had its jurisdiction conferred by the Federal Power Act, 16 U.S.C. § 825p to entertain an action based on an order of the Federal Power Commission requiring the City to pay these charges.

On May 13, 1971 the City filed a complaint against CEI before the FPC, alleging anticompetitive acts by CEI and praying, inter alia, that CEI be required to construct at the expense of the City, an emergency permanent electrical interconnection between CEI's Electric Light Plant and the City's Municipal Electric

Light Plant (MELP). The subsequent decision and order of the Administrative Law Judge (ALJ) found the City's charges of antitrust violations against CEI were unsupported by the evidence. He found:

> [T]he City's past inability to furnish reliable, dependable service on the MELP System ha[d] been due primarily to incompetent management and inefficient operation.

The ALJ did find, however, that the public interest required the construction, at the sole expense of the City, of an emergency 138 kilovolt permanent synchronous interconnection between the City's Lake Road Plant and CEI's Lake Shore Plant. Further, it was ordered that existing emergency service provided the City by CEI over an existing 69 KV temporary nonsynchronous open-switch interconnection should be continued until the new facilities were operational.

These orders were affirmed by the FPC in its Opinion No. 644, issued January 11, 1973, with the provision that the orders would not take effect unless both parties accepted the conditions imposed by the FPC and entered an agreement to that effect between themselves to govern the new service. Opinion No. 644 fixed the rates to be charged for the power to be sold via both the 138 KV and the 69 KV interconnections.

Further, noting that the "City ha[d] for some time refused to pay, or ha[d] been quite late in paying, certain bills

rendered by CEI," for electric current supplied to the City, which current the City sold to its customers, the FPC ordered that an additional five percent could be added to invoices unpaid after forty-five days. It was also ordered that if an invoice went unpaid for sixty days an additional charge of one percent of the amount of the original bill could be added for each unpaid month thereafter. This additional charge of one percent per month was intended, not as a penalty, but rather to compensate CEI for the cost of maintaining its working capital during a prolonged period of nonpayment.

In its Opinion No. 644-A, issued March 9, 1973, the FPC denied the City's application for rehearing and stay of its previous orders. The orders of FPC were appealed by the City to the United States Court of Appeals for the District of Columbia Circuit, and were in all respects affirmed except as to the rate structure which was remanded for further consideration. City of Cleveland v. FPC, 174 U.S.App.D.C. 1, 525 F.2d 845 (1976), clarified and compliance ordered, 561 F.2d 344 (D.C.Cir.1977).

CEI filed motions with the FPC on July 13, 1973 and on January 30, 1974, alleging the continued and repeated neglect and failure of the City to pay for power provided via the existing 69 KV interconnection, and seeking enforcement of the payment provisions of the previous FPC orders. On April 8, 1974 the FPC issued an order directing compliance with its previous orders, and ordered the City to make payment to CEI of all undisputed charges for past and future services,

including any accrued interest, and also ordered the City to deposit in escrow any disputed amounts. The City has neglected to comply with this order.

The District Court found that the 1973 FPC orders and corresponding enabling legislation of the City Council were reduced to a contract between the City and CEI on April 17, 1975, and on May 4, 1975 service was initiated over the 138 KV interconnection. Under the relevant FPC orders and the contract entered pursuant thereto, CEI is required to maintain the 138 KV permanent synchronous interconnection in operation, and is powerless to control the amount of power which the City draws over it.

Having failed to obtain from the City payment for its power furnished as ordered by the FPC on April 8, 1974, CEI has sought recovery therefor in its counterclaims in the present case.

CEI alleged in Count 2 of its Second Counterclaim that the City had failed to make payment for power delivered from May 4, 1975 through November 30, 1975 in the principal amount of $5,808,593.11, and further that the City had failed to pay costs of construction of the new interconnection in the amount of $15,241, as was ordered by FPC. Count 3 alleged that the City had failed to pay charges due for the period from December 1, 1975 through February 29, 1976 in the principal amount of $3,701,233.39. Count 4, pursuant to a stipulation of the parties, detailed unpaid charges for the period from March 1, 1976 through December 31, 1976 in the principal amount of $3,925,460.98. All of

these items total the principal sum of $13,450,528.48, to which should be added interest and the additional charges authorized in the FPC order of January 11, 1973.

Summary judgment was granted by the District Court on all counts. Interest at six percent per annum from July 31, 1975 was imposed on the judgment for construction costs of the interconnection, and on the power charges at one percent per month from the closing date of each respective period. Although the judgment on Count 4 was silent on the matter of interest the evident intent of the Court to apply the interest charge is shown by its incorporation, as if fully rewritten, of its earlier order granting summary judgment on Counts 2 and 3.

[1] The City did not oppose CEI's motion for summary judgment on Count 3. As before stated, with respect to Counts 2 and 4 the City claimed that the District Court lacked subject-matter jurisdiction over CEI's counterclaims. The Court held that the counterclaims were compulsory counterclaims to the antitrust action already properly before the Court, and thus were within the ancillary jurisdiction of the District Court. Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926).

We agree. Ancillary jurisdiction exists for the purposes of the promotion of judicial efficiency and economy, and complete justice to all parties to a controversy. See 13 Wright, Miller and Cooper, Federal Practice & Procedure § 3523 (1975). These same policies im-

pelled the Supreme Court in Moore to effect a significant expansion of the scope of ancillary jurisdiction to encompass compulsory counterclaims. See Southern Const. Co. v. Pickard, 371 U.S. 57, 60, 83 S.Ct. 108, 9 L.Ed.2d 31 (1962).

In Moore the plaintiff complained that his Odd-Lot Cotton Exchange was being denied cotton price quotations by defendant New York Cotton Exchange in violation of the Sherman Act. Defendant counterclaimed alleging that the quotations had been denied because plaintiff had been operating a fraudulent "bucket shop," in violation of defendant's rules, and further that plaintiff was purloining the quotations and using them in his business without any intention of paying for them. Both parties sought injunctive relief.

The Supreme Court affirmed the dismissal by the District Court of the antitrust action, and affirmed the order of that Court enjoining plaintiff from further appropriation of quotations without permission. The Court held first, that defendant's counterclaim was compulsory under Equity Rule 30, the predecessor to the present Fed.R.Civ.P. 13(a), which provided that an answer must state "any counterclaim arising out of the transaction which is the subject-matter of the suit;" and second, that complete justice could not be done without extending the District Court's jurisdiction to permit an injunction "restraining appellant from continuing to obtain by stealthy appropriation what the court had held it could not have by judicial compulsion."

It is by now well settled that all such compulsory counterclaims are within the ancillary jurisdiction of the federal courts, even if, considered alone, they would ordinarily be matters within the jurisdiction of state courts. Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1, 94 S.Ct. 2504, 41 L.Ed.2d 243 (1974). Compulsory and permissive counterclaims are defined by Fed.R.Civ.P. 13 as follows:

> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.
>
> (b) Permissive Counterclaims. A pleading may state

> as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

The rule generally followed in determining whether a counterclaim is compulsory is that stated in Moore, which defined "transaction" as follows:

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. [270 U.S. at 610, 46 S.Ct. at 371.]

See Baker v. Gold Seal Liquors, Inc., 417 U.S. at 469 n.1, 94 S.Ct. 2504; 6 Wright and Miller, Federal Practice & Procedure § 1410 (1971). Cf. Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970).

In our opinion it was the view of the Moore Court that the policies of judicial economy and of doing complete justice to the parties require that the counterclaim be presented and that the Court entertain and decide it. In Moore it was stated at 610 of 270 U.S., at 371 of 46 S.Ct.:

> The refusal to furnish the quotations is one of the links

> in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiffs rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim.

So too, in the present case, we approve the exhaustive factual analysis of the District Court, and we agree with its conclusion that "the allegations of the Complaint, in and of themselves, encompass and embrace the allegations of the Counterclaims."

It can hardly be denied that the determination of the City's antitrust claims would require the

determination of both the benefits conferred by CEI as well as its alleged detriments. Inevitably, the reasoning process of the District Court would require it to substantially determine the rights of the parties under their contract. Thus the claims and counterclaims, as explained in Moore, arose out of the same "transaction," and the policies of judicial economy and of doing complete justice require that CEI not be sent to yet another forum for a second determination of the same matters.

Undisputed evidence established both the amount of power delivered to the City during the period of the alleged antitrust violations and its value under legally established rates. It established also the value of the interconnection. Thus the counterclaims presented an appropriate case for summary judgment, and summary judgment was properly granted.

We note that several courts have reached like results on facts analogous to those presented here. See Moore v. New York Cotton Exchange, supra; Albright v. Gates, 362 F.2d 928 (9th Cir. 1966); Interphoto Corp. v. Minolta Corp., 47 F.R.D. 341 (S.D.N.Y. 1969); Channel Marketing, Inc. v. Telepro Indus., Inc., 45 F.R.D. 370 (S.D.N.Y. 1968); G & M Tire Co. v. Dunlop Tire & Rubber Corp., 36 F.R.D. 440 (N.D.Miss. 1964). Cf. Weit v. Continental Ill. Nat'l Bk. & Tr. Co.

of Chicago, 60 F.R.D. 5, 8 (N.D.Ill. 1973).

III

In addition to the foregoing there is an independent ground for jurisdiction in the court below, for if the judgment of the District Court was correct on any ground it is entitled to affirmance. Dandridge v. Williams, 397 U.S. 471, 475 n.6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 82 L.Ed. 224 (1937). Cf. Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 96 S.Ct. 2158, 48 L.Ed.2d 784 (1976).

[2] Even if CEI's counterclaims were merely permissive and thus not within the ancillary jurisdiction of the District Court the counterclaims still presented a federal question within the Court's jurisdiction.

The Federal Power Act, 16 U.S.C. § 825p, provides:

> The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter of the rules, regulations, and orders thereunder, and of all

> suits in equity and actions at law brought to enforce any liability or duty created [thereby], or to enjoin any violation [thereof] . . .. Any suit or action to enforce any [such] liability or duty . . . may be brought in . . . the district wherein the defendant is an inhabitant . . ..

See California v. Oroville-Wyandotte Irrigation Dist., 411 F.Supp. 361 (E.D.Cal. 1975), aff'd, 536 F.2d 304 (9th Cir. 1976); Mississippi Power & Light Co. v. FPC, 131 F.2d 148 (5th Cir. 1942); Cleveland Elec. Illuminating Co. v. City of Cleveland, 50 Ohio App.2d 275, 363 N.E.2d 759 (1976), cert. denied, ____ U.S. ____, 98 S.Ct. 175, 54 L.Ed.2d 127 (1977).

The City contends that the counterclaim is based on contract and not on an order of the FPC. This contention appears to us to be without merit. FPC ordered the City to enter into the contract in order to be entitled to the 138 KV interconnection which the City sought. CEI filed motions with FPC on July 13, 1973 and on January 30, 1974, alleging the continued failure of the City to pay for power provided through the existing 69 KV interconnection, and seeking enforcement of the payment provisions of the previous FPC orders. As before stated, on April 8, 1974 FPC issued an order directing compliance with its previous orders and ordering the City to make payment to CEI of all undisputed charges for past and future services, including any accrued interest,

and to deposit in escrow any disputed amounts. (App. 0150). Clearly this is a definite order to pay.

Instead of depositing the disputed amounts in a special escrow account as ordered by FPC, the City deposited such amounts in its own bank account. The City's own bank account can hardly be characterized as a special escrow account.

[3] The fact the FPC filed suit against the City in the Federal District Court for the District of Columbia to enforce its order of April 8, 1974, does not preclude CEI from filing its counterclaim to enforce said order so long as the charges have remained unpaid and the order of FPC remains unenforced.

Under the statute the District Court had jurisdiction to entertain these counterclaims as enforcing the FPC orders of January 11 and March 9, 1973 (Nos. 644 and 644-A), and April 8, 1974, and the contract entered into pursuant thereto.

For the reasons stated, the judgments of the District Court are affirmed.

The City's motion for stay is denied without prejudice to renewal before the District Court upon showing good faith efforts to issue bonds, the proceeds of the sale of which are to be used to satisfy the judgments.

Upon remand the Court may determine the issues relating to any disputed amounts owing by the City.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL POWER COMMISSION,	)	
	)	
Plaintiff	)	
	)	Civil Action
CLEVELAND ELECTRIC	)	
ILLUMINATING COMPANY,	)	NO. 75-2081
	)	
Intervenor-plaintiff,	)	
	)	
v	)	
	)	
CITY OF CLEVELAND, et al.,	)	
	)	
Defendants.	)	

Decided June 14, 1978

O P I N I O N

This action seeks a permanent injunction to compel compliance with several orders issued by the Federal Power Commission. Plaintiff[1], originally the Federal Power Commission, now the Federal Energy Regulatory Commission, filed a

---

1 Pursuant to the Department of Energy Organization Act, the functions of the Federal Power Commission under the Federal Power Act were transferred to the Department of Energy and the Federal Energy Regulatory Commission (FERC) effective October 1, 1977. The Federal Energy Regulatory Commission is now the party plaintiff in this proceeding.

42complaint pursuant to Section 314 of the Federal Power Act, 16 U.S.C. §825m, for the enforcement of final, non-appealable orders of the Commission. These orders established lawful rates for electric service provided by the Cleveland Electric Illuminating Company (CEI), the intervenor in this proceeding, to the defendant, the City of Cleveland, Ohio (Cleveland). The case is before the Court on motions of the plaintiff and the intervenor for partial summary judgment.

Cleveland owns and operates the Municipal Electric Light Plant (MELP) which supplies approximately 20% of the total retail electric load for the city. CEI, an independent company, in interconnected with facilities of other utility systems contiguous to its own, thereby facilitating the coordination of supplies of electric energy to meet the needs of various utilities. It provides the remaining 80% of the total retail electric load within Cleveland.

In December, 1969, MELP suffered a forced outage of its largest generating unit leaving it with insufficient generating capacity to serve its customers. Shortly thereafter, CEI and Cleveland entered into an agreement providing that CEI would furnish Cleveland with switching and 11 kv load transfer service. CEI began service under the agreement on February 15, 1978. In March 1971, Cleveland began protesting the bills rendered by CEI for the 11 kv load transfer service. After negotiations failed to resolve the billing dispute, Cleveland filed, on or about May 13, 1971, a complaint with the FPC seeking a resolution of the rate dispute and also requesting

that the FPC order a permanent interconnection between CEI and Cleveland pursuant to Section 202(b) of the Federal Power Act.

Following further major outages in Cleveland's generating plant, the FPC, on February 8, 1972 ordered that a temporary 69 kv interconnection be established between CEI and Cleveland, in addition to the existing 11 kv load transfer service. After hearings in March and April 1972, the Presiding Examiner (now Administrative Law Judge) issued his Initial Decision finding that a permanent synchronous interconnection between CEI and Cleveland was in the public interest.

On January 11, 1973, the FPC issued Opinion No. 644 affirming the Initial Decision for the most part, directing continuation of both the temporary 69 kv interconnection and the 11 kv load transfer service, and ordering establishment of a permanent synchronous 138 kv interconnection between the electrical systems of CEI and Cleveland. This opinion also established the rates, terms and conditions for the 69 kv and 138 kv interconnections. On March 16, 1978, Cleveland notified the FPC of its agreement to the terms of Opinion No. 644.

On March 19, 1973, Cleveland filed a petition for review of Opinion No. 644 and 644-A with the United States Court of Appeals for the District of Columbia Circuit.

The Commission, on April 8, 1974, issued an order finding that Cleveland had failed to make payments for electric

services rendered by CEI and that Cleveland was not complying with Opinion No. 644. The FPC directed Cleveland to pay all sums due and owing to CEI at that time and to pay those due in the future to which no controversy attached. Cleveland was ordered to segregate these amounts of the controversial billings into a separate escrow account.

On April 19, 1974, Cleveland filed a motion with the United States Court of Appeals for the District of Columbia Circuit seeking an order directing the FPC to vacate its order of April 8, 1974. On April 30, 1974, the Court denied Cleveland's motion.

On June 9, 1975, CEI filed yet another motion with the FPC alleging that Cleveland was still violating the payment provisions of Opinion No. 644. CEI claimed it had received no payments since February 10, 1975 from Cleveland. CEI requested that the Commission enforce Opinion No. 644 and the Order of April 8, 1974. In response to CEI's motion Cleveland, in a filing dated June 26, 1975, stated inter alia, that "there is no refusal to pay the bills, but a present inability to do so..." On December 12, 1975 the FPC filed the instant complaint with this Court.

On January 9, 1976, the United States Court of Appeals for the District of Columbia Circuit issued its decision on Cleveland's petition for review of Opinion Nos. 644 and 644-A (City of Cleveland, Ohio v. FPC, 174 U.S. App. D.C. 1, 525 F.2d 845). In its opinion, the Court affirmed the FPC orders, except as they related to one clause regarding bills

rendered for the 11 kv load transfer service prior to May 17, 1972. The Court specifically affirmed (1) the FPC's determination of the rates for the 69 kv temporary interconnection and the 138 kv permanent interconnection, (2) the FPC's inclusion of the Ohio Excise Tax in the rates, and (3) the interest provision for late payment.

Cleveland has been receiving energy from CEI and, with minor exceptions, does not dispute the amounts of energy received. Cleveland admits that the Commission orders set the rates for the 69 kv and 138 kv electric services and that it has not paid CEI for all amounts billed by CEI for services rendered.

In addition, Cleveland has not been paying the interest due on CEI bills calculated in accordance with the order of April 8, and has refused to pay the Ohio Excise Tax to CEI, although Opinion No. 644 (para. 19, supra) requires it do so unless the State of Ohio directs otherwise. Cleveland disputes all or portions of the bills received from CEI, but has not shown that such amounts have been placed in the escrow account.

Cleveland filed suit in the United States District Court for the Northern District of Ohio against CEI and other utilities alleging violations of the Sherman Anti-trust Act, 15 U.S.C. §§1 and 2. (City of Cleveland, Ohio v. Cleveland Electric Illuminating Co., et al., Civ. Act. No. C75-560). CEI counterclaimed for amounts due and owing from May 4, 1975 through February 29, 1976. On December 31, 1976 Judge Krupansky granted these

motions for summary judgment and ordered Cleveland to obey the laws of Ohio and incorporate in its budget an annual Appropriation measure equal to the amounts of the final judgments of that Court against Cleveland.

On March 9, 1978, Judge Krupansky issued another order holding that Cleveland by its "open, intentional, willful and continuing refusal to comply with the duly enacted laws of Ohio" was in contempt of the Court's prior orders, levied a fine against Cleveland, directed Cleveland to comply with its prior orders, and threatened to dismiss the complaint filed by Cleveland.

To the extent that orders of the commission are not reversed or remanded they are final and non-appealable. §313(b) Federal Power Act, 16 U.S.C. 8251(b). United States v. Utah Construction and Mining Co., 384 U.S. 394 (1965), City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 335-336 (1958), Callahan Road Company v. The United States, 345 U.S. 507, 512 (1953). As stated above, on January 9, 1976 the Court of Appeals for the District of Columbia Circuit affirmed all but one aspect of the Commission's Order in Opinion No. 644. The portion not affirmed related to rates Cleveland was being charged by CEI prior to May 17, 1972. In addition, Cleveland never appealed from the April 8, 1974 Order of the Commission requiring Cleveland to comply with the Commissions previous order. Thus, except for one small portion of Opinion No. 644, the Commission's orders are final and non-appealable and are binding on CEI and Cleveland. The motion for partial summary judgment relate only to those

aspects of the Commission's orders which pertain to matters occurring after May 17, 1972, and which are therefore final.

In the action pending before Judge Krupansky, Cleveland filed its reply to the original counterclaim of CEI. This reply contained certain admissions. Additional admissions were made when Cleveland filed its answers to the complaint in this action. The depositions of several employees of Cleveland taken during March and April 1977 also contained sworn statements of relevance to the motions for partial summary judgment. These admissions and sworn statements establish that Cleveland has not complied with the orders of the Commission.

Cleveland is bound by these admissions and sworn statements. Since there is no issue of fact with regard to them, as a matter of law, the Commission and CEI are entitled to relief. See, United States v. General Motors Corporation, 518 F.2d 420 441 (D.C. Cir. 1975).

Pursuant to Sections 314(a) and 317 of the Federal Power Act, 16 U.S.C. §§825m(a) and 825p, this Court has power to enjoin final commission orders. As stated above the relevant portions of Opinion No. 644 are final. A review of the facts, the admissions in pleadings and sworn testimony and the orders of the United States District Court for the Northern District of Ohio establish that Cleveland has received energy pursuant to an interconnection ordered by the Commission in Opinion Nos. 644 and 644-A, but has refused to obey those same orders and the order of April 8, 1974 by failing to pay in full undis-

puted amounts for the service rendered by CEI and by failing to place all disputed amounts, including interest and excise tax, in an escrow account.

Because this action is rooted in the statutory framework of the Federal Power Act, the Commission need not prove irreparable injury nor inadequacy of other remedies at law; once a violation is proven, the injunction should issue. Securities and Exchange Commission v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975); Commodity Future Trading Commission v. British America Commodity Corp., (2d Cir. 1977). Here a violation has been proven and partial summary judgment granting the injunction is proper.

In view of the foregoing, the Court will also order an accounting to determine which amounts of Cleveland's order should be allocated to CEI and which to the escrow account. The plaintiff, defendants and intervenor shall each provide one qualified person to process the actual accounting and one qualified person to review any electrical engineering data necessary for the resolution of the accounting. Such accounting shall be compiled within 45 days at which time a report shall be submitted to the Court and served upon all parties indicating the amounts defendants are to pay intervenor and the amounts defendants are to pay into the escrow account.

Accordingly, the motions of plaintiff, Federal Energy Regulatory Commission and intervenor, The Cleveland Electric Illuminating Company for partial summary judgment are

granted and the Commission's request for an accounting is granted.

_____
United States District Judge

Dated:

June 14, 1978

UNITED STATES CODE ANNOTATED

28 U.S.C.A. § 1257 (1966)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Ohio Rev. Code Ann. § 133.24 (Page's 1978).

Power to issue bonds for permanent improvement; estimate.

The taxing authority of any subdivision may issue the bonds of such subdivision for the purpose of acquiring or constructing any permanent improvement which such subdivision is authorized to acquire or construct. Bonds heretofore or hereafter authorized by the electors to pay the subdivision's share of the cost of any one or more improvements, which bonds are not payable in whole or in part from special assessments, may be issued upon the declaration by the taxing authority of the necessity to issue such bonds and prior to the institution or completion of any proceedings required by any provision of law to authorize the making of the improvement or the expenditure of the proceeds of the bonds. No subdivision or other political taxing unit shall create or incur any indebtedness for current operating expenses, except as provided in sections 133.27 to 133.31, inclusive, of the Revised Code.

The estimate of the life of permanent improvements proposed to be acquired, constructed, improved, extended, or enlarged from the proceeds of any bonds shall be made by the fiscal officer of the subdivision and certified by him to the bonds issuing authority and shall be binding upon such authority.

Ohio Rev. Code Ann. § 133.27 (Page's 1978).

Issue of bonds to pay final judgment.

When the fiscal officer of any subdivision certifies to the bond-issuing authority that, within the limits of its funds available for the purpose, the subdivision is unable to pay a final judgment or judgments rendered against the subdivision in an action for personal injuries or based on any other noncontractual obligation, then such subdivision may issue bonds for the purpose of providing funds with which to pay such final judgment in an amount not exceeding the amount of the judgment or judgments together with the costs of the suit in which such judgment or judgments are rendered and interest thereon to the approximate date when the proceeds of such bonds are available.